Nos. 82-1172 and 82-1225

In the Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM BRATTON, PETITIONER

v.

UNITED STATES OF AMERICA

HARTLEY E. GREENLEAF, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioners waived their right to challenge the sufficiency of the evidence on appeal when, after the denial of their motions for acquittal at the close of the government's case, they introduced evidence on their own behalf and then failed to renew their acquittal motions at the conclusion of all the evidence.

2. Whether the district court's imposition of consecutive sentences for the RICO offense and the predicate acts of mail fraud violated the Double Jeopardy Clause.

3. Whether the district court gave an improper proof-of-intent instruction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Page

Cases—Continued:

Constitution and statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1172

WILLIAM BRATTON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 82-1225

HARTLEY E. GREENLEAF, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (82-1172 Pet. App. 1-26) is reported at 692 F.2d 182.

JURISDICTION

The judgment of the court of appeals (82-1225 Pet. App. 2a) was entered on November 2, 1982. The petition for a writ of certiorari in No. 82-1172 was filed on January 3, 1983. The petition in No. 82-1225 was filed on January 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioners were each convicted on four counts of mail fraud, in violation of 18 U.S.C. 1341 and 2, and on one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) (82-1172 Pet. 3; 82-1225 Pet. App. 1a). Petitioner Bratton was also convicted on one count of interstate transportation of fraudulently obtained property, in violation of 18 U.S.C. 2314 (82-1172 Pet. 3). Petitioner Bratton was sentenced to three years' imprisonment on the RICO count and to concurrent two-year terms of probation on each of the other counts, to commence at the completion of the sentence on the RICO count. Petitioner Greenleaf was sentenced to two years' imprisonment on the RICO count, followed by concurrent terms of two years' probation on the remaining counts. Each petitioner was fined $2,500. The court of appeals affirmed (82-1172 Pet. App. 1-26).

1. The evidence at trial is summarized in the opinion of the court of appeals (82-1172 Pet. App. 3-5, 8-9). It showed that petitioners were appointed by Joseph "Gus" Manning, a trustee and organizer for Local 25 of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, to serve as Teamster "captains" during the production of certain motion pictures (*id.* at 3). As captains, petitioners were responsible for filling out "start slips" for Teamster employees who were hired to drive motor vehicles during the filming of the movies (*id.* at 3, 9). The captains were also responsible for submitting time cards for the employees and for distributing the resultant salary checks (*id.* at 4).

While serving as captains, petitioners forged start slips and submitted time cards for four men who did not work on the movies (82-1172 Pet. App. 4).[1] The start slips consisted of payroll information on one side and an IRS W-4 form on the other (*id.* at 3-4). Petitioners gave the address of Gus Manning as the address of the purported employees on the W-4 forms, and Manning endorsed and cashed the salary checks (*id.* at 4). The mail fraud charges were based on the W-2 forms mailed by the movie producers at the end of the year to the "no show" employees at Manning's address, as well as pension fund contributions and remittance reports that were mailed to two Teamster pension funds in the names of the "no show" employees (*id.* at 4-5, 8-9).[2]

2. On appeal, petitioners contended, *inter alia*, that there was an insufficient nexus between the mailings and the scheme to defraud to justify their mail fraud convictions. Relying on established First Circuit precedent (*United States* v. *Kilcullen*, 546 F.2d 435 (1976), cert. denied, 430 U.S. 906 (1977)), the court of appeals held (82-1172 Pet. App. 7) that petitioners had waived this objection by failing to renew their unsuccessful motions for acquittal at the close of all the evidence. The court therefore stated that petitioners' sufficiency of the evidence claim would be reviewed under a "clear and gross" injustice standard (*ibid.*).

Applying that standard of review (82-1172 Pet. App. 8-14), the court of appeals concluded that there was a

---

[1]One start slip, submitted by petitioner Greenleaf, was filled out in the name of a fictitious person (82-1172 Pet. App.4). The other slips were submitted in the names of actual persons who did not perform any work on the movies (*ibid.*).

[2]Petitioners were not alleged to have had any connection with each other in carrying out the schemes (82-1172 Pet. App. 3).

sufficient nexus between the mailings and the fraudulent scheme to sustain petitioners' convictions. The court noted that "the schemes required for their continuing success the creation of an appearance of business as usual," and the "the mailings at issue here were an integral part of that appearance" (*id.* at 13). The court also observed that "the defendants apparently contemplated the generation of [the] mailings, since they used Manning's address on the forged W-4 forms in order, one might conclude, to prevent W-2s from being sent to persons who would reveal the scheme" (*ibid.*). The court of appeals expressly declined to decide, however, how it would have ruled if the issue had been properly preserved (*ibid.*).

ARGUMENT

1. Petitioners contend (82-1172 Pet. 9-16; 82-1225 Pet. 10-12) that the court of appeals erred in holding that they waived their motions for judgment of acquittal on the grounds of insufficient evidence when they introduced evidence in their defense and then failed to renew their acquittal motions at the conclusion of trial. Petitioners assert that their introduction of evidence did not operate as a waiver of their motions and renewal was therefore unnecessary. Ten courts of appeals, however, have held to the contrary. See *United States* v. *Kilcullen, supra,* 546 F.2d at 441; *United States* v. *Keuylian,* 602 F.2d 1033, 1040-1041 (2d Cir. 1979); *United States* v. *Trotter,* 529 F.2d 806, 809 n.3 (3d Cir. 1976); *United States* v. *Stradley,* 295 F.2d 33, 35 (4th Cir. 1961); *United States* v. *Sanders,* 639 F.2d 268, 269 (5th Cir. 1981); *United States* v. *Swainson,* 548 F.2d 657, 662-663 (6th Cir.), cert. denied, 431 U.S. 937 (1977); *United States* v. *Tubbs,* 461 F.2d 43, 45 (7th Cir.), cert. denied, 409 U.S. 873 (1972); *United States* v. *Sanders,* 547 F.2d 1037, 1040 n.5 (8th Cir. 1976), cert. denied, 431 U.S. 956 (1977); *United States* v. *Figueroa-Paz,* 468 F.2d 1055, 1058-1059 (9th Cir. 1972); *United States* v. *Morris,* 623

F.2d 145, 152 (10th Cir.), cert. denied, 449 U.S. 1065 (1980)). This Court, moreover, has indicated its approval of the waiver rule. See *McGautha* v. *California*, 402 U.S. 183, 215-216 (1971); *United States* v. *Calderon*, 348 U.S. 160, 164 n.1 (1954).[3]

The introduction of evidence by the defense operates as a waiver of any objection to the denial of a motion for acquittal at the close of the government's case because a reviewing court is entitled to consider the sufficiency issue on the basis of all the evidence in the case, including the evidence introduced by the defense. See *McGautha* v. *California*, *supra*, 402 U.S. at 215. A renewed motion for acquittal at the conclusion of the trial is thus necessary in order to afford the district judge, who is in the best position to evaluate the evidence, an opportunity to rule on the sufficiency claim in the first instance. See *United States* v. *Kilcullen*, *supra*, 546 F.2d at 441.[4]

---

[3]Petitioners cite cases from the Seventh and Eighth Circuits (82-1172 Pet. 11; 82-1225 Pet. 16) in which the waiver rule has not been invoked. See *United States* v. *Rizzo*, 416 F.2d 734, 736 n.3 (7th Cir. 1969); *United States* v. *Burton*, 472 F.2d 757, 763 (8th Cir. 1973). However, in post-*Rizzo* Seventh Circuit cases, the waiver rule has been repeatedly endorsed. See *United States* v. *Kampiles*, 609 F.2d 1233, 1238 & n.8 (7th Cir. 1979), cert. denied, 446 U.S. 954 (1980); *United States* v. *Fearn*, 589 F.2d 1316, 1321 (7th Cir. 1978); *United States ex rel. Curtis* v. *Illinois*, 521 F.2d 717, 722 (7th Cir.), cert. denied, 423 U.S. 1023 (1975). And the present approach in the Eighth Circuit is to review sufficiency of the evidence claims under the plain error rule where the issue has not been properly preserved. See *United States* v. *Sanders*, *supra*, 547 F.2d at 1040 n.5. That approach is essentially identical to the one employed by the court below.

[4]Petitioner Bratton argues (82-1172 Pet. 14) that the waiver rule is unfair because it "protects * * * inherently defective government cases that could never be proved without evidence supplied by the defendant." As one commentator has pointed out, however, the notion that federal prosecutors "knowingly commence prosecution in weak cases

As petitioners point out, the District of Columbia Circuit does not apply the waiver rule. Rather, where a defendant moves for acquittal at the close of the government's case in chief, the court of appeals tests a sufficiency of the evidence claim against the evidence presented by the government. See, *e.g., United States* v. *Pardo*, 636 F.2d 535, 547 (D.C. Cir. 1980); *United States* v. *Watkins*, 519 F.2d 294, 297 (D.C. Cir. 1975). Any conflict between the District of Columbia cases and the decision here, however, is not of sufficient importance to warrant review, particularly in light of this Court's decisions endorsing the waiver rule (*McGautha* v. *California, supra; United States* v. *Calderon, supra*), and the fact that, under the "clear and gross" injustice standard applied by the court below, "essentially unfounded conviction[s]" would not be sustained. *United States* v. *Kilcullen, supra*, 546 F.2d at 441.

In any event, resolution of petitioners' asserted conflict over the waiver issue would not affect the ultimate disposition of this case because the mailings are sufficient to support petitioners' mail fraud convictions even under the ordinary standard of appellate review. In *United States* v. *Maze*, 414 U.S. 395, 403 (1974), this Court stated that mailings are sufficiently closely related to a fraudulent scheme under the mail fraud statute where they "lull the

---

with the idea that defendants will be forced to convict themselves * * * is dubious." 8A J. Moore, *Moore's Federal Practice*, para. 29.05 n.8 (2d ed. 1982). Nor does the waiver rule undermine the privilege against self-incrimination because a defendant who chooses to testify as a result of the denial of his motion for acquittal takes the risk that his testimony will fill a gap in the government's case (82-1172 Pet. 15). Such a defendant is perfectly free to rest on his motion instead of testifying or to put on a defense consisting of evidence other than his own testimony; requiring such hard choices is not unconstitutional. See *McGautha* v. *California, supra*, 402 U.S. at 213; *United States* v. *Figueroa-Paz, supra*, 468 F.2d at 1059. In any event, neither petitioner in this case chose to testify.

victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely." Here, the court of appeals correctly found (82-1172 Pet. App. 13) that the mailing of the W-2 forms and the remittance reports advanced the fraudulent scheme by creating "an appearance of business as usual." Further, the court correctly held that the evidence permitted the inference that petitioners used Manning's address on the forged W-4 forms in order to prevent W-2 forms from being sent to "no-show" employees who might reveal the scheme (*ibid.*). Thus, the nexus between the mailings and the fraudulent scheme was sufficiently close to support the mail fraud convictions.

Contrary to the assertion of petitioner Greenleaf (82-1225 Pet. 19), it is of no consequence that the mailings occurred about three months after the receipt of the paychecks that were the fruit of the fraudulent scheme. The courts have held that the sufficiency of a mailing to support a mail fraud conviction " 'does not turn on time or space, but on the dependence in some way of the completion of the scheme or the prevention of its detection on the mailing in question.' " *United States* v. *Blecker*, 657 F.2d 629, 636 (4th Cir. 1981), cert. denied, 454 U.S. 1150 (1982), quoting *United States* v. *La Ferriere*, 546 F.2d 182, 187 (5th Cir. 1977); *United States* v. *Kent*, 608 F.2d 542, 546 (5th Cir. 1979), cert. denied, 446 U.S. 936 (1980). As shown above, the mailings in this case were crucial to the completion of petitioners' fraudulent scheme and the prevention of its detection.[5]

---

[5]Because the nexus between the mailings and the fraudulent scheme was sufficient to support petitioners' mail fraud convictions under the ordinary standard of appellate review, petitioner Greenleaf's claim (82-1225 Pet. 18-22) that the nexus was insufficient even under the "clear and gross" injustice standard applied by the court of appeals is plainly without merit.

2. Petitioner Greenleaf contends (82-1225 Pet. 25-31) that the district court erred in imposing cumulative penaltes for the RICO offense and the predicate acts of mail fraud. In his view, the predicate acts of mail fraud are lesser-included offenses within the substantive RICO count, and thus the imposition of cumulative penalties is prohibited by the Double Jeopardy Clause.

Even if petitioner's argument were correct, however, his total sentence would be unchanged. The substantive RICO offense requires only two predicate acts of racketeering and petitioner was convicted on four counts of mail fraud. Thus, even assuming that two mail fraud counts somehow merged with the RICO offense, petitioner's conviction on the remaining mail fraud counts would be unaffected and would sustain his overall sentence.

In any event, petitioner's double jeopardy contention was correctly rejected by the court below (82-1172 Pet. App. 26). The RICO statute clearly evidences Congress' intent to authorize cumulative sentences for the RICO offense and its predicate acts of racketeering. As the court of appeals explained in *United States* v. *Rone*, 598 F.2d 564, 572 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980):

> Congress clearly intended the Act to provide for new penal prohibitions and enhanced sanctions. If we were to accept appellants' theory that sentences imposed under RICO and those imposed for the predicate offenses may not run consecutively, then Congress' purpose would be thwarted. If the RICO sentence must run concurrently with a sentence for any predicate crime, there would be no "enhanced" penalties. A conviction under RICO would, in fact, grant immunity for the offenses charged in the "pattern of racketeering." With the maximum penalties for RICO violations

> much less than those that might be obtained for the series of predicate crimes (18 U.S.C. § 1963), the RICO statutes would be rarely used.

Where cumulative penalties are authorized by statute, the imposition of such penalties in a single sentencing proceeding following a single trial does not violate the Double Jeopardy Clause (*Albernaz* v. *United States*, 450 U.S. 333, 344 (1981)), and the courts of appeals have consistently sustained consecutive sentences for RICO offenses and the underlying racketeering acts. See *United States* v. *Dean*, 647 F.2d 779, 785 n.14 (8th Cir. 1981), cert. denied, 456 U.S. 1006 (1982); *United States* v. *Morelli*, 643 F.2d 402, 413 (6th Cir.), cert. denied, 453 U.S. 912 (1981); *United States* v. *Boylan*, 620 F.2d 359, 361 (2d Cir.), cert. denied, 449 U.S. 833 (1980); *United States* v. *Aleman*, 609 F.2d 298, 306-307 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Rone*, *supra*, 598 F.2d at 571-572.

3. Under the mail fraud statute the government was required to show that petitioners caused the mailings at issue with the specific intent to defraud. See *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954). The district court instructed the jury (2 A. 749)[6] that

> an intention may be inferred by you from the surrounding circumstances, including the acts and conduct of a defendant. The guilty knowledge cannot be proved by merely showing negligence, carelessness or foolishness on the part of the defendant. It is reasonable, however, for you to infer that a person ordinarily intends the natural and probable consequences of an act that you find he knowingly did.

Invoking this Court's decision in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), petitioner Greenleaf contends (82-1225

---

[6]"A." refers to the appendix in the court of appeals.

Pet. 32-37) that the above instruction was improper because it shifted the burden of proof to the defense on the matter of intent.

In *Sandstrom, supra,* 442 U.S. at 517-519, 524 (emphasis omitted; citation omitted), the Court found unconstitutional an instruction that " 'the law presumes that a person intends the ordinary consequences of his voluntary acts' " because the instruction could be interpreted as a direction to the jury to find the requisite intent or as an imposition of the burden of persuasion on the defendant. Here, however, the court instructed the jury in terms of "inference," not "presumption." See *Sandstrom, supra,* 442 U.S. at 527-528 (Rehnquist, J., concurring). Moreover, the instruction did not compel the jury to infer intent based on the surrounding circumstances, but merely advised it that it may do so. This distinction between mandatory presumptions and permissible inferences is widely recognized by the federal courts of appeals. See, *e.g., Pigee* v. *Israel,* 670 F.2d 690, 693-695 (7th Cir. 1982) cert. denied, No. 81-6802 (Oct. 4, 1982); *United States* v. *Davis,* 608 F.2d 698, 699 (6th Cir. 1979), cert. denied, 445 U.S. 918 (1980); *United States* v. *Mayo,* 646 F.2d 369, 375 (9th Cir.), cert. denied, 454 U.S. 1127 (1981).[7] Furthermore, "a single instruction to the jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten,* 414

---

[7]Petitioner's reliance on previous decisions of the court below (82-1225 Pet. 33) is unavailing. The instruction involved in *United States* v. *Winter,* 663 F.2d 1120, 1143 (1st Cir. 1981), stated that the jury could "presume" that a person intends the natural and probable consequences of his act. The case, therefore, is inapposite to the instruction at issue here, which was couched in terms of inference rather than presumption. In *United States* v. *Ariza-Ibarra,* 605 F.2d 1216, 1228 (1st Cir. 1979), the court stated that an instruction substantially identical to the one here "came perilously close to * * * error" but it found it unnecessary to decide the issue. In any event, intra-circuit conflicts do not warrant this Court's review.

U.S. 141, 146-147 (1973). Examined in this light, the jury could not have construed the court's charge as shifting the burden of proof to the defense on the matter of intent. The court repeatedly instructed the jury that the defense had no burden of proof at all while the government had the burden of proving beyond a reasonable doubt every element of the crime, including intent (2 A. 725-728, 735, 747-749, 751-756, 759).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

MARCH 1983

DOJ-1983-03